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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1093

BEST MEDIUM PUBLISHING CO. INC.,

Petitioner,

—v.—

MELVIN VARNISH

Respondent.

PETITIONER'S REPLY BRIEF

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I

The reasons for granting the writ come well within Rule 19.

The respondent urges this Court not to grant petitioner writ of certiorari on the ground that the petition presents none of the specified reasons as set forth in Rule 19 of the Supreme Court Rules (42 F.R.D. 81, 94-95, formerly Rule 38). Rule 19 defines the circumstances under which this Supreme Court, in its discretion, may find it appropriate to grant a review on writ of certiorari. It provides that this Court may grant review when a court of appeals ". . . has decided a federal question in a way in conflict with applicable decisions of this court; . . . ."

The principal thrust of petitioner's main brief is that petitioner's constitutional rights have been violated by the holding below which construed its published article to

be an invasion of respondent's right of privacy. Petitioner has urged in its main brief (pp. 13-22) that the record of this case fails to prove that the alleged offending article (a) was materially false as to respondent and (b) was motivated by calculated malice on the part of the petitioner. It is respectfully submitted that the court of appeals below has decided a federal question involving the petitioner's constitutional right of freedom of press under the First Amendment in a way which conflicts with the prior decisions of this Court in that the proof adduced below has patently failed to meet the standard for defeasance of petitioner's constitutional rights under the First Amendment, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *St. Amant v. Thompson*, 390 U.S. 727 (1968).

Furthermore, it has been urged in petitioner's main brief (pp. 8-9) that the Court of Appeals below has rendered a decision concerning an important state law in conflict with the present applicable state law of Pennsylvania. Thus, the Court below has held that purportedly false statements about the respondent's deceased wife constitutes an invasion of respondent's privacy which is, in fact, in conflict with the holding of *Aquino v. Bulletin Co.*, 190 Pa. Super. 528, 154 A.2d 422, 430 (1959). *Aquino* explicitly held that an action for invasion of privacy under Pennsylvania law is a personal action and that a publisher is only liable for what it related about a plaintiff and not what it related about some third party.

A further reason to be considered by this Court is the rendition by a court of appeals of a decision ". . . in conflict with a decision of another court of appeals on the same matter; . . .". The petitioner's main brief (pp. 10-13) urges that the holding of the Court of Appeals below rep-

resents a conflict with the holding of the Court of Appeals for the Third Circuit in the case of *Jenkins* v. *Dell Publishing Co.*, 251 F.2d 447 (3rd Cir., 1958), cert. den. 357 U.S. 921 (1958).

Finally, the itemization in Rule 19 of the various reasons to be considered by this Court in granting review on certiorari does not limit the exercise of this Court's discretion to the enumerated reasons. As the Rule expressly states, the denoted reasons are not controlling nor do they fully measure the Court's discretion, but, rather, the granting of review is an exercise of sound discretion when there are special and important reasons therefor.

It is respectfully submitted that there could hardly be any more important reason for granting certiorari than in the present case where the instant decision of the Court of Appeals below effects such a serious erosion of a fundamental liberty—that of freedom of the press.

II

A jury verdict impinging upon the right of free press is subject to scrutiny by this Court, particularly where the record discloses an absence of substantial evidence to meet established criteria for its defeasance.

Respondent urges that this Court may not interfere with the jury verdict rendered below by reason of Amendment VII of the United States Constitution. Petitioner has no quarrel with the general proposition that, upon a motion for a directed verdict and for a judgment n.o.v., the trial court was required to view the evidence in a light most favorable to the party against whom such motions were made. Nevertheless, there still remains a burden upon that

party to adduce substantial evidence to meet the legal criteria which this Court has prescribed in its recent decisions of *Time, Inc.* v. *Hill, supra; New York Times, Co.* v. *Sullivan, supra,* and *St. Amant* v. *Thompson, supra.* This burden was never sustained.

The petitioner's brief has catalogued the testimony of the respondent with respect to the standard of material falsity, (pp. 3-5). Nothing publishing about *him* by the petitioner was materially false. Instead, he has urged that the description of the late Mrs. Varnish as "the happiest mother" produced a false and distorted picture of respondent in that it placed him ". . . in ironic circumstances rather than in the tragic circumstance which was thrust upon him" (Respondent's brief pp. 9-10).

It thus appears that the respondent seeks the endorsement from this Court of a principle which would impose a new stricture on freedom of press. To the existing limitation of material falsity, which clearly is not present in the case at bar, the respondent would add a new one of "irony". And even this new proposed limitation, the respondent would have this Court apply to the instant case upon the flimsiest and most dubious of evidence where there is not one unkind or uncomplimentary or false statement made concerning him.

Nor is the respondent's resort to Pennsylvania law any more promising basis for restricting petitioner's privilege to publish the alleged offending article. Such publication was entitled to the constitutional protection of the First Amendment. The controlling Pennsylvania authorities, such as *Jenkins* v. *Dell Publishing Co., supra* and *Aquino* v. *Bulletin Company, supra* and the landmark Supreme Court case of *Time, Inc.* v. *Hill, supra,* have set forth with

great precision the criteria shielding a free press from claims of invasion of privacy. These authorities have been reviewed in some detail in the petitioner's main brief but the Varnish opposing brief has deliberately ignored these authorities completely, except to unjustifiably assert that the *Aquino* case supports the Varnish position. In that case, however, the Court found that there was fictionalization as to the plaintiffs therein. There simply is no such proof of material fictionalization as to respondent in the case at bar.

The supreme importance of the fundamental right of freedom of press has led this Court, in the past, to review the entire record of a case in determining whether the standard of defeasance of First Amendment immunity has been met before such immunity may be withdrawn. Thus, in *Time, Inc.* v. *Hill,* this Court held that the principles set forth in *New York Times, Co.* v. *Sullivan* must be applied in the context of the legal and factual situation involved (385 U.S. at 390-391). Undoubtedly, this Court reviewed the entire record in *Time, Inc.* v. *Hill* to determine whether that record justified the defeasance of the publisher's First Amendment immunity. This Court did not hesitate to overturn the jury verdict rendered in favor of the plaintiff therein when the record failed to show that the article was materially false and was published with actual malice. Not only was there a failure of proof in this instant case as to material falsity, there was no substantial showing of knowledge of such falsity or that there was a reckless disregard of the truth (See petitioner's main brief pp. 5-6).

It is respectfully urged that in the absence of proof of actual malice, there was no warrant here for the award of compensatory damages, let alone punitive damages.

III

The respondent has introduced scandalous matter in contravention of Rule 40, subd. 5 (42 F.R.D. 81, 112).

The respondent has made an unethical as well as an unfounded inflammatory appeal to this Court's sympathies. In his brief he has charged the petitioner with conjuring up "morbid" and "perverse pictures" of kissing dead babies (pp. 13, 20). Upon the trial, Mr. Varnish did not deny that he had kissed his dead children (R. 68).* In fact, an objective reading of the article reveals that the Enquirer's account of this incident was actually a gentle and tender description of an act of grief which most loving fathers would have performed under the same tragic circumstances.

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* As Varnish admitted (R. 68), this area of alleged falsity was the subject of interrogation upon his deposition before trial. Upon that deposition he admitted that he had kissed his children but could not remember if he had said anything (Varnish's deposition, pp. 34-35). Inasmuch as he had admitted upon his deposition that the statement in the article itself was not false, he did not upon the trial assert its falsity. His counsel however, without any factual evidence to support his contention, has sought to make capital of this incident and has recklessly described it as "complete fictionalization" (Respondent's Brief, p. 13) and was a conjuring up of "perverse pictures" (Respondent's Brief p. 20). It is submitted that Mr. Varnish's counsel should not have stooped to this impropriety inasmuch as Exhibit 6 for identification upon the trial,—an article appearing in the San Francisco *Chronicle* on September 28, 1963—expressly contained this reference to Varnish as having kissed each child and having sobbed out his forgiveness. In view of the fact that Mr. Varnish himself, upon the trial, did not assert this description of his grief as having been untrue and especially in view of his admissions upon the examination before trial, no further effort was made to bring Exhibit 6 into evidence.

CONCLUSION

It will be a sad day for the press of this country if irony is to be equated with knowing material falsity and the holding below is permitted to stand on the basis of the flimsy, insubstantial and immaterial evidence of alleged invasion of Varnish's privacy.

It is respectfully urged that the petition for review be granted.

Respectfully submitted,

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